

## **Report from CEQ's Proposed NEPA Guidance Listening Session**

1 to 4 p.m. Thursday, April 15, 2010  
Tucson, Arizona

Prepared by

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for the White House Council on Environmental Quality

### **I. BACKGROUND**

On February 18, 2010, the White House Council on Environmental Quality (CEQ) published three draft guidance documents to modernize and reinvigorate the National Environmental Policy Act (NEPA), in conjunction with NEPA's 40th Anniversary. These draft guidance documents are designed to assist Federal agencies in meeting the goals of NEPA, enhance the quality of public involvement in governmental decisions relating to the environment, increase transparency, and ease agencies' NEPA implementation.

To modernize NEPA, CEQ has issued the draft guidance for public comment on: (1) when and how Federal agencies must consider greenhouse gas emissions and climate change in their proposed actions; (2) clarifying appropriateness of "Findings of No Significant Impact" and specifying when there is a need to monitor environmental mitigation commitments; and (3) clarifying how to establish and use categorical exclusions. The draft guidance documents and other information is available at:

<http://www.whitehouse.gov/administration/eop/ceq/initatives/nepa>

Before the guidance documents are finalized and published, CEQ wants to: (1) get input and hear perspectives from people who have experience with the issues or will need to implement the guidance; and (2) gauge whether people who are reading the guidance understand what was intended in order to identify necessary revisions.

CEQ asked the U.S. Institute for Environmental Conflict Resolution (Institute) to assist in convening and facilitating a Listening Session on the three draft guidance documents, in Tucson, Arizona, for these purposes. The Institute is an impartial federal program created in 1998 to provide conflict resolution and other services to assist in collaboratively resolving environmental conflicts involving federal agencies. The Institute is part of the Udall Foundation, an independent federal agency established in recognition of the commitment of Morris K. and Stewart L. Udall to consensus and civility in addressing environmental issues. See [www.ecr.gov](http://www.ecr.gov) for more information.

The Listening Session was hosted by the James E. Rogers College of Law of the University of Arizona, the first law school founded in Arizona. The Rogers College of Law is consistently ranked in the top tier of law schools in the U.S. and has three student publications: [Arizona Law Review](#), [Arizona Journal of International and Comparative Law](#), and [Arizona Journal of Environmental Law & Policy](#). The [William H. Rehnquist Center on the Constitutional Structures of Government](#) was founded at the school in 2006. See <http://www.law.arizona.edu> for more information.

Institute staff compiled a list of invitees in the Tucson and Phoenix area, focusing on stakeholders in the following categories: federal agency environmental/natural resource staff; tribal environmental or other staff; NEPA lawyers in private law firms; state agency environmental or other staff; University of Arizona law school and natural resources faculty and staff; environmental non-governmental organizations; power utilities; and mining firms. The invitation included a request to forward it on to interested colleagues (*See Invitation, Appendix A*). The invitation was also distributed to the State Bar of Arizona environmental law section and to the University of Arizona's Institute of the Environment faculty list. Institute staff also made follow-up calls to individuals in under-represented categories to identify additional invitees and to encourage participation. Nineteen people attended. (*See Participant list, Appendix B*).

The listening session was held on April 15, 2010. The University of Arizona's James E. Rogers College of Law provided video streaming to an adjacent law school room so staff and students could observe at their convenience. The University's Institute of the Environment provided a informal reception following. Joan Calcagno, U.S. Institute Senior Program Manager/Mediator at the Institute facilitated the listening session with support from Patricia Lewis, Coleen Whitaker, and Tamara Underwood.

## **II. THE LISTENING SESSION**

After welcome and introductions, Horst Greczmiel, Associate Director for NEPA Oversight, Council on Environmental Quality, provided a brief overview of NEPA. Each guidance document was considered in turn, beginning with an overview from Mr. Greczmiel, followed by input from participants who had statements to make, questions and answers, and closing comments. (*See Agenda, Appendix C and PowerPoint Presentation, Appendix D*)

## **III. PARTICIPANT COMMENTS**

Note that some input statements below were presented as a question in the session. However, in order to capture the breadth of input, the substance of the question has been included.

### ***Draft Guidance on the Considerations of Greenhouse Gases (GHG)***

- The guidance should be clearer as to whether it requires a quantification of GHG emissions as well as how that information is to be used when developing and analyzing alternatives.
- Consider whether the 25 metric tons/annum threshold, based on the Environmental Protection Agency's (EPA) reporting threshold, is appropriate and whether something

higher would be more appropriate. For example, the tailoring rule that EPA is currently developing includes a 75 metric ton threshold, which may be appropriate for the guidance.

- Clarify that with regard to the 25 metric tons/annum threshold, the agency has to look at impact twice in some circumstances (e.g., the electricity production and the use of the electricity).
- Because 25 metric tons/annum is not considered a measure of significance, the guidance should provide help in determining an appropriate significance threshold.
- Consider whether the guidance should give an indication of how GHG should be weighted/ considered in the totality of the impact analysis.
- Open recognition of unfolding science is important. Consider language that could be put into the guidance to make clear that evolving science should be taken into account.
- Acknowledge that if there are changes in available scientific information over time, the guidance will have to be adjusted as well (for example, changes in the 25 metric tons/annum threshold).
- The guidance should more clearly define “indirect” or put limits on what is meant by “indirect” GHG effects and provide examples.
- Consider providing language dealing with the apparent inconsistency in the guidance re: recommending that agencies consider projected climate change (CC) effects that might result, while recognizing that these are not well known.
- Highlight how fundamentally different assessing GHG and CC impacts is from assessing other types of environmental impacts (due to nature of uncertainty, indirect effects, range of impacts, etc). (*See Cover Letter and Climate Change Guidance Document, Appendix E*)
- Define what “uncertainty” means and the nature of the uncertainty in this context.
- Use illustrations/analogies to help deal with the conceptual issues of CC. (*See Appendix E*)
- With regard to adaptation, the guidance should be more explicit about the difference between adaptive strategies and adaptive management. (*See Appendix E*)
- More agencies will have to look at climate science and not all will have the expertise to do this. This guidance should provide more guidance on how to unpack these issues. (*See Appendix E*)
- Yes, Land and Resource Management Plans should be included.
- Clarify that these requirements should not cause delay or affect timing of assessments because agencies already have to quantify emissions under reporting requirements and emphasize that this guidance does not impose new requirements.
- Make it clear that the guidance is intended to apply to existing projects.
- Clarify that the guidance will not impact the Forest Service rule revision decisions being made because agencies already have to consider CC as an impact.

- Clarify how this guidance is meant to interact with Executive Orders (EO) (for example, expanding discussion of EO 13514).
- Clarify how this guidance is related to CC guidance being issued by other agencies and that it is not intended to contradict agency CC guidance.
- Include direction to agencies to refer to existing laws, etc., that require agencies to consider mitigation alternatives.
- Clarify what effect the guidance will have on other jurisdictions' planning efforts (i.e., state trust land planning and conservation cooperatives planning work).
- There is little point to having guidance if agencies do not follow it or choose to ignore it. CEQ should do everything it can to encourage agencies to follow the guidance, even if it is guidance and not the law.

### ***Draft Guidance Clarifying Use of Categorical Exclusions***

Note that although the comment period is technically over for this guidance, Mr. Greczmiel assured participants that their comments will be considered.

- More attention should be paid to engaging tribes – tribes are not “the public” and need to be engaged differently.
- At some point it will be necessary to start addressing smaller sources of GHG; clarify how CEQ proposes to do this with regards to CEs.

### ***Draft Guidance Clarifying Findings of No Significant Impact, Mitigation and Monitoring***

- Make it clear that the guidance gives an agency the flexibility to take into account other permit requirements and to incorporate these.
- Make it clear that the guidance gives the agency the flexibility to consider state requirements.
- The text of the guidance does not adequately reflect CEQ's intent with regard to transparency and active public involvement in mitigation and monitoring. These aspects need to be strengthened.
- Many times only summarized monitoring information is available and this is not the data for which people are looking.
- Mitigation is routinely under-funded but will be required even more in the future. CEQ should recognize and address this growing requirement.
- In order to help fund mitigation and monitoring, which is often under-funded, the guidance could state that if an agency does not have the funds for mitigation, the agency cannot proceed with the action.

### *Perspectives Generally Applicable to Each of the Guidance Proposals*

- Clarify the legal effect of the guidance and the hoped-for intent that the guidance will be given deference by the courts.
- The law is clear that EAs and EISs are public documents, but in practice they are not actually publicly available. This is astounding, particularly given the technical capacity of our age. It could be added into this guidance. Making EAs and EISs publicly available on the web is a simple, fundamental and necessary change. (*See Farber and Miller - A Simple But Fundamental Step, Appendix F*)
- Consider whether a technical correction to NEPA or the CEQ regulations is necessary to make this possible.
- We need to remember that the point of NEPA was maintaining a resilient and healthy system. This ultimate goal of protecting the environment does not come across in the guidance.
- NEPA needs to look not at further avoidance, but at further rigor in managing our interactions with landscapes in a way that is sustainable over time. That doesn't come across in the guidance.

#### **IV. NEXT STEPS**

The CEQ plan is to go directly from addressing the public input (comments and the listening sessions) to issuing final guidance. However, based on the amount and kinds of comments they receive, CEQ may decide to do something iterative.

Everyone was encouraged to provide specific language suggestions. CEQ will post editable (Word doc) versions on its website ([http://ceq.hss.doe.gov/current\\_developments/new\\_ceq\\_nepa\\_guidance.html](http://ceq.hss.doe.gov/current_developments/new_ceq_nepa_guidance.html)) so that anyone can make edits and then post that back to the site. Go to [http://ceq.hss.doe.gov/current\\_developments/new\\_ceq\\_nepa\\_guidance.html](http://ceq.hss.doe.gov/current_developments/new_ceq_nepa_guidance.html). Comments are available at: <http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/comments>.

#### **Specific text revisions/input identified:**

There were several topics specifically identified for text revisions:

- Language to reflect the appropriate engagement of tribes and any places in any of the guidance proposals that do not already include "Tribal."
- Language to clearly reflect the intent to take evolving science into account.
- If it is not already clear, language that clarifies that quantification of emissions to analyze alternatives should be considered.
- Improvements to the section on making monitoring data publicly available.

## V. APPENDICES

- App A: Text of invitation
- App B: List of participants and observers
- App C: Agenda
- App D: PowerPoint Slides
- App E: Cover letter and document: *How to Take climate Change into Account: A Guidance Document for Judges Adjudicating Water Disputes.*
- App F: Document: Farber and Miller, *A Simple but Fundamental Step: Put All EISs & EAs on the Web.*